TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Note

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Principle 6:

Protection of Cultural Property During Expeditionary Operations Other Than War

Introduction

This note is the seventh in a series[1] that discusses concepts of the law of war that might fall under the category of "principle" for purposes of the Department of Defense (DOD) Law of War Program.[2]

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01,[3] *Implementation of the DOD Law of War Program*[4] obligates U.S. forces to obey the principles of the law of war during Military Operations Other Than War. Protecting cultural property is a fundamental principle of the law of war, as reflected in international law judgments, scholarly works, and U.S. manuals and policy.[5] Accordingly, U.S. forces must protect cultural property during Military Operations Other Than War. This note defines cultural property, examines sources of law supporting the development of this principle as customary international law, and summarizes requirements to protect cultural property during contingency operations.

Definition

Cultural property includes "buildings dedicated to public worship, art, science, or charitable purposes; and historic monuments."[6] More specifically, "cultural property" means, "irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people . . . , (b) buildings whose main . . . purpose is to preserve or exhibit . . . movable cultural property, [and] (c) centers containing a large amount of cultural property . . . to be known as 'centers containing monuments.'"[7]

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1. International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17. International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov., 1998, at 50; International and Operational Law Note, *Principle 5: Protecting the Force from Unlawful Belligerents*, ARMY LAW., Feb., 1999, at 21.

2. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979) [hereinafter DOD DIR. 5100.77]. *See also* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter CJCSI 5810.01].

3. CJCSI 5810.01, *supra* note 2, para. 4a ("The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however, such conflicts are characterized, and unless directed by competent authorities, will apply law of war principles during operations that are characterized as Military Operations Other Than War."). *Chairman, Joint Chiefs of Staff Instruction 5810.01* cites no specific principle of the law of war for compliance, instead, it states DOD policy and directs forces to comply with the laws of war in both armed conflict and operations other than war. This requires forces to figure out which law(s) of war apply in a particular situation.

4. A cornerstone of the Instruction is *DOD Directive 5100.77*, which directs that U.S. forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." DOD DIR. 5100.77, *supra* note 2.

5. *See* The Statute of the International Court of Justice (ICJ), 1949, art. 38, para. 1, 59 Stat. 1055, T.S. 993, 3 Bevans 1179 (1945) [hereinafter ICJ Statute]. The ICJ Statute lists sources of international law applied by the ICJ as:

> [I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [and] . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Id.

6. Morris Greenspan, THE MODERN LAW OF LAND WARFARE 284 (1959). *See* U.S. DEP'T OF AIR FORCE, AIR TRAINING COMMAND PAM 110.4, at 6 (15 Nov. 1985) ("You are required to take as much care as possible not to damage or destroy buildings, or their contents, dedicated to cultural or humanitarian purposes. Examples of such places are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospitals . . . ; schools; and orphanages.").

7. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 1, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].

Primary Sources of Law [8]

Protecting cultural property is a law of war principle that is grounded in treaty law,[9] customary international law,[10] and as legal opinions and commentary. Early treaty provisions on the duty to protect cultural property are found in the 1907 Hague Convention IV.[11] These treaty rules are still binding; indeed, they have ripened into customary international law as seen by their influence on later treaties[12] and opinions. The early treaty-based cultural property duties are:

> In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.[13]
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> . . . .
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> The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when [s]tate property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[14]

The most precise expression of this principle is the 1954 Cultural Property Convention.[15] Although the United States has not yet ratified this treaty, U.S. forces comply with the Convention during armed conflict. For example, during the Persian Gulf War, U.S. forces selected targets to avoid cultural objects and religious sites.[16] The Convention seeks to protect[17] cultural property during international armed conflict,[18] internal armed conflict,[19] and occupation.[20] Cultural property should be marked with the convention's distinctive emblem to identify it as protected property.[21] Regarding the distinctive emblem, the Convention provides:

> [The emblem] shall take the form of a shield, pointed below, per saltire blue and white (as a shield consisting of a royal blue square, one of the angles of which forms the point of the shield, and of a royal blue triangle above the square, the space on either side being taken up by a white triangle). . . . The emblem shall be used alone or repeated three times in a triangular formation. . . .[22]

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8. *See* IJC Statute, *supra* note 5.

9. *See, e.g*, 1954 Cultural Property Convention, *supra* note 7.

10. "[S]ome treaty rules have gradually become part of customary law. This . . . applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and . . . to the core of Additional Protocol II of 1977." *Prosecutor v. Tadic*, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted at* 35 I.L.M. 32 (1996).

11. October 18, 1907, annex I [hereinafter Hague IV].

12. The main text of the 1954 Cultural Property Convention states that the "high contracting parties" are "guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of the Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935." 1954 Cultural Property Convention, *supra* note 7. *See* Greenspan, *supra* note 6, at 650 (discussing the 1923 Draft Hague Rules of Warfare).

13. Hague IV, *supra* note 11, art. 27.

14. *Id.* art. 56.

15. *See* 1954 Cultural Property Convention, *supra* note 7. *See also* Captain Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277 (1997) (discussing the treaty development of the principle of combatant duty to protect of cultural property).

16. Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview,* 37 A.F. L. REV. 41, 51 n.59 (1994).

17. 1954 Cultural Property Convention, *supra* note 7, arts. 2-4, 8-9 (establishing a scheme of protection based on respect for, and safeguarding of, cultural property).

18. *Id*. art. 18.

19. *Id*. art. 19.

20. *Id*. art. 5.

21. *See id.* arts. 6, 10, 16.

22. *Id.* art. 16. *See* Kastenberg, *supra* note 15, at 303 (reproducing the Hague symbol and the *Roerich Pact* symbol).

The 1977 Protocols I and II Additional to the Four Geneva Conventions of 1949 restated the principle of protecting cultural property.[23] Protocol I provides for distinction, or discrimination, by combatants between cultural property and military targets.[24] Combatants must always "distinguish between . . . civilian objects and military objectives and accordingly direct their operations only against military objectives."[25] Furthermore, Protocol I forbids combatants from: "(a) [committing] any acts of hostility directed against the historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples; (b) [using] such objects in support of the military effort; (c) [making] such objects the object of reprisals."[26]

Though less detailed and arguably broader in scope, Protocol II, [27] which deals with internal conflicts, contains similar language protecting cultural property. Protocol II states that "it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."[28] Reviewing both Protocols, the duty of armed forces to protect cultural property applies to both international and internal armed conflicts. This universal application, during both types of armed conflict, supports the development of the principle as a fundamental principle of the law of war.

International case law is the final primary source of authority relating to the protection of cultural property during military operations. Commenting on the *Prosecutor v. Tadic*[29] opinion, one scholar observed: "The Tribunal concluded that some customary rules had developed to the point where they govern internal conflicts and that they cover such areas as . . . protection of civilian objects, in particular cultural property."[30] *Tadic* reinforced the interplay between treaty and customary law by citing Article 19 of the Hague Cultural Property Convention as an example of "treaty rules that have gradually become part of international law."[31]

Additional Sources of Law

As previously noted, DOD policy requires U.S. armed forces not only to obey the laws of war, but also to "apply law of war principles during operations other than war."[32] Implementing service regulations and manuals reflect this policy. This section explores both Army and Air Force publications protecting cultural property during contingency operations.

Field Manual (FM) 27-10 [33] establishes rules from the law of armed conflict applicable to contingency operations.[34] The United States specifically observes the duty to protect cultural property during war[35] and respects this principle during contingency operations, specifically peacekeeping (PK) and peace enforcement (PE) operations. *Field Manual 100-5* states:

> Because of the special requirement in peace operations for legitimacy, care must be taken to scrupulously adhere to applicable rules of the law of war. Regardless of the nature of the operation (PK or PE) and the nature of the conflict, U.S. forces will comply with the rel-

23. Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* 12 Dec. 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* 12 Dec. 1977, 1125 U.N.T.S. 1391, 16 I.L.M. 1391 [hereinafter Protocol II].

24. Protocol I, *supra* note 23.

25. *Id.* art. 48.

26. *Id.* art. 53.

27. Protocol II, *supra* note 23.

28. *Id.* art. 16.

29. Case no. IT-94-1 AR 72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

30. Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation Of International Humanitarian Law*, 90 AM. J. INT'L. L. 238, 240 (1996).

31. *Tadic*, 35 I.L.M. 32.

32. DOD DIR. 5100.77, *supra* note 5.

33. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10].

34. U.S. DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 48 (Dec. 1994). "Regardless of who has authorized the peace operation, international law and U.S. domestic laws and policy apply fully. For example, the laws of war . . . and policy apply to U.S. forces participating in the operation." *Id.*

35. U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-3 (June 1993). "Exercising discipline in operations includes limiting collateral damage—the inadvertent or secondary damage occurring as a result of actions by friendly or enemy forces. *FM 27-10* provides guidance on special categories of objects that international law and the Geneva and Hague Conventions protect." *Id.*

> evant portions of *FM 27-10* and [*Department of the Army*] *Pamphlet 27-1*. In a traditional PK operation, many uses of force may be addressed in the mandate or TOR (terms of reference). In a PE operation, the laws of war may fully apply.[36]

Field Manual 27-10 incorporates several law of war requirements that relate to the protection of cultural property. Using the same wording as Article 27 of the Hague Convention,[37] *FM 27-10* begins by describing cultural property as buildings to be spared.[38] Next, the manual notes the requirement for cultural buildings to display signs specified in Hague IX Concerning the Bombardment by Naval Forces in Time of War.[39] Specifically, *FM 27-10* states: "It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."[40] Another cultural property provision in *FM 27-10* is entitled "Protection of Artistic and Scientific Institutions and Historic Monuments."[41] Here, *FM 27-10* provides: "The United States and certain of the American Republics are parties to the so-called *Roerich Pact*, which accords a neutralized and protected status to historic monuments, museums, scientific, artistic, educational, and cultural institutions in the event of war between such [s]tates."[42] *Field Manual 27-10* then describes "municipal, religious, charitable, and cultural property"[43] by using the exact language of Hague IV, Article 56.[44] The manual describes certain permissible uses of cultural property based on military necessity.[45] The manual then further restricts the use of medical facilities to medical purposes only.[46]

The Air Force approach to protection of cultural property is found in *Air Force Pamphlet 110-31*,[47] which includes cultural property as a category of objectives that receive "special protection."[48] Relying on Article 27 of Hague IV,[49] Article 5 of Hague IX,[50] and the *Roerich Pact*,[51] *Air Force Pamphlet 110-31* states:

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36. *Id.* at 48-49.

37. *See* Hague IV, *supra* note 11.

38. FM 27-10, *supra* note 33, para. 45.

39. 18 Oct. 1907, 36 Stat. 2314 [hereinafter Hague IX].

40. FM 27-10, *supra* note 33, para. 46.

41. *Id.* para. 57.

42. *Id*. *See* Treaty Regarding Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15. 1935, 49 Stat. 3267, 3 Bevans 254 [hereinafter Roerich Pact].

43. *Id*. para. 405(a).

44. *See* Hague IV, *supra* note 11, art. 56.

45. FM 27-10, *supra* note 33, para. 405(b). *Field Manual 27-10* states:

> Use of Such Premises. The property included in the foregoing rule may be requisitioned in case of necessity for quartering the troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and generally as prescribed for private property. Such property must, however, be secured against all avoidable injury, even when located in fortified places which are subject to seizure or bombardment.

Id.

46. *Id*. para. 405(c). *Field Manual 27-10* states:

> Religious Buildings, Shrines, and Consecrated Places. In the practice of the United States, religious buildings, shrines, and consecrated places employed for worship are used only for aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use.

Id.

47. U.S. DEP'T OF AIR FORCE, PAM 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (19 Nov 1976) [hereinafter AF PAM 110-31].

48. *Id.* para. 5-5c.

49. *See supra* note 11, art. 27.

50. *See* Hague IX, *supra* note 39, art. 5.

> Buildings devoted to religion, art, or charitable purposes as well as historical monuments may not be made the object of aerial bombardment. Protection is based on their not being used for military purposes. Combatants have a duty to indicate such places by distinctive and visible signs. When used by the enemy for military purposes, such buildings may be attacked if they are, under the circumstances, valid military objectives.[52]

Air Force Pamphlet 110-31 embraces the principle of distinction[53] and the concept of collateral damage[54] in guiding targeting decisions that may affect cultural property. "Lawful military objectives located near protected buildings are not immune from aerial attack by reason of such location but insofar as possible, necessary precautions must be taken to spare such protected buildings."[55]

Summary

United States policy obligates forces to protect cultural property during Military Operations Other Than War. This duty stems from the emergence of the principle to protect cultural property as a fundamental principle of the law of war. Simply stated, during contingency operations U.S. forces should protect property marked with the distinctive emblems of the 1954 Cultural Property Convention, or property that otherwise seems to be of historical, artistic, scientific, or religious significance. The general guidance in *FM 27-10* remains applicable during contingency operations. For example, U.S. forces should only use cultural buildings for emergencies during times of military necessity.[56] During contingency operations, U.S. forces should act consistent with the occupation rules of the 1954 Cultural Property Convention, and "take the most necessary measures of preservation."[57] Major Larry D. Youngner, Jr.

Consumer Law Note

Legal Assistance Attorneys Must Continue to Educate Soldiers on the Dangers of Excessive Debt

In a recent newsletter article, the National Consumer Law Center (NCLC) reported documented links between increasing consumer debt and the rise in bankruptcies.[58] The article cites studies by a number of government agencies as well as other economists that support a conclusion that deregulation has caused "a loosening of underwriting standards that have caused a rise in consumer bankruptcies."[59]

The growth in credit card debt within the United States is staggering. Seventy-five percent of United States "households have at least one credit card, and three out of four cardholders carry credit card debt from month-to-month."[60] Credit card lenders have issued over a billion credit cards in this country, which amounts to "a dozen credit cards for every household in the country."[61] The most important number, however, may be the dollar value of outstanding loans—$422 billion in 1997.[62] This may not seem impressive until you consider that this is *twice* what the dollar amount was in 1993. The amount doubled in a mere four years.[63] Despite this apparent flooding of the market, the credit industry mailed three billion solicitations in 1997, or about forty-one per household.[64] Over the course of the previous four years, this amounted to about one million dol-

51. *See supra* note 42.

52. *Id.*

53. "Distinction," as a principle, calls for the discrimination between combatant targets and noncombatants, such as civilians and civilian property that if destroyed would offer no military advantage. *See generally* Protocol I, *supra* note 23, arts. 51, 57. For example, Article 51(4) applies "indiscriminate" as a term of art to attacks "of a nature to strike military objectives and civilian or civilian objects without distinction." *Id.* art. 51(4).

54. Collateral damage refers to unintentional or incidental injury or damage to persons or objects other than military objectives or targets. Collaterally damaged persons or objects would not have been lawful military targets in the circumstances ruling at the time, if targeted alone. Collateral damage violates the law of armed conflict when such damage is excessive in relation to the concrete and direct military advantage anticipated. *Id.* art. 51, para. 5(b), art. 57, paras. 2(a)(iii), 2(b).

55. AF PAM 110-31, *supra* note 47, para. 5-5c.

56. FM 27-10, *supra* note 33, para. 405 (a)-(c).

57. 1954 Cultural Property Convention, *supra* note 7.

58. *Facts About Consumer Debt and Bankruptcy*, 17 NCLC REP. BANKR. AND FORECLOSURE ED. (National Consumer Law Center), Sept/Oct. 1998, at 6 [hereinafter NCLC REP.].

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.*

lars of credit being offered to each household in the United States.[65] These statistics beg the question of why the credit card issuers offer so much credit. The answer is simple—profit. According to the NCLC, "[I]n the third quarter of 1997, credit card banks showed a 2.59 percent return on assets, compared to a 1.22 percent return on assets reported by all commercial banks."[66]

These facts are important to legal assistance attorneys. The NCLC reports that many of the problems with credit card debt predominantly affect low-income consumers. Overall, "one family in nine pays more than 40 percent of its income on debt service. At income levels below $25,000, this number rises to one in six."[67] Many of our junior enlisted soldiers fit into this income category. In the past, attorneys may have assumed that these soldiers would not get credit card solicitations, or that the card issuer would not approve them for credit. That assumption is clearly invalid today. Legal assistance practitioners must be aggressive in educating young soldiers about the dangers of excessive credit and in referring them to other help agencies that can provide training in financial management. Otherwise, practitioners will continue to see the results in our legal assistance offices as we try to pick up the pieces of soldiers' financial messes. Major Lescault.

Debt Collectors Must Report Debts as Disputed, Whether or Not the Consumer Disputes the Debt in Writing

The Fair Debt Collection Practices Act (FDCPA)[68] protects consumers by proscribing a number of abusive and deceptive practices by debt collectors. For instance, the FDCPA prohibits debt collectors from using any false or misleading representations during debt collection.[69] One of these false or deceptive practices in the FDCPA's nonexclusive list[70] is "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed."[71] The United States Court of Appeals for the First Circuit recently interpreted this provision in *Brady v. The Credit Recovery Co*.[72]

Prior to 1990, William Brady's then-wife rented an apartment.[73] The lease listed Mr. Brady as a tenant, although Mr. Brady never signed the document.[74] In August 1990, the land-

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 15 U.S.C.A. §§ 1692 (West 1999).

69. *Id.* § 1692e.

70. Congress established a general rule in § 1692e stating that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. Congress went on to list a number of practices that it considered false or misleading, but introduced them with this preface: "Without limiting the general application of the foregoing [general rule], the following conduct is a violation of this section." *Id.*

71. *Id.* § 1692e(8). Among the other listed examples are:

> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
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> . . . .
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> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
> . . . .
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> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
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> . . . .
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> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

Id.

72. 160 F.3d 64 (1st Cir. 1998).

73. *Id.* at 65. Apparently, the Bradys divorced some time in 1990. When the debt collection action began in August of 1990, the court says that the woman involved was now Brady's ex-wife. *Id*.

lord referred the Brady account to The Credit Recovery Company (CRC) for nonpayment of rent. The CRC sent a letter to Mr. Brady attempting to collect the debt.[75] Brady telephoned the CRC and informed them that he had never signed the lease and was not obligated to pay.[76] Although the CRC told him to put his dispute in writing, Mr. Brady never did.[77] After about a year of collection efforts, the CRC reported Mr. Brady's alleged delinquency to various credit reporting agencies. In the report, they did not mention any dispute regarding the debt.[78]

Five years later, in 1996, Mr. Brady had trouble financing a home purchase because of this debt problem on his credit report.[79] He sued the CRC for violating the FDCPA. Mr. Brady asserted that the CRC violated 15 U.S.C.A. § 1692e by failing to report to the credit reporting agencies that he was disputing the debt.[80] The CRC countered that 15 U.S.C.A. § 1692g defined the term "disputed debt" for the entire FDCPA and that the definition required disputes to be in writing.[81] The First Circuit rejected the CRC's proposition.

The court relied on three classic rules of statutory construction. First, they analyzed the plain language of § 1692e.[82] On its face, this provision contains no writing requirement. Second, the court looked to see if the term was defined within the statute.[83] Congress did not define "disputed debt" in the statute's definition section.[84] Third, since Congress did not define the words within the statute, the court looked to the ordinary meaning of those terms and found that "[i]n ordinary English 'dispute' is defined as a 'verbal controversy' and 'controversial discussion.'"[85] Thus, the ordinary understanding of "dispute" did not require a writing.

The First Circuit addressed the CRC's argument that the court did not need to resort to plain language because the "definition" of "disputed debt" in § 1692g applied throughout the Act.[86] The court found that the provision in §1692g(b) supported its conclusion that Congress did not require disputes to be in writing. First, because Congress included a writing requirement in § 1692g, it must have intentionally omitted that requirement from § 1692e.[87] Second, the court noted the different effect of the two provisions. The dispute under §1692g invokes the validation process that stops all collection efforts until the collector validates the debt. Section 1692e has no such effect. Collection efforts may continue; the collector must simply report the dispute. Thus, the conclusion that Congress intentionally omitted the writing requirement in §1692e is logical.[88] Finally, § 1692e requires the collector to report the dispute if the collector "knows or should know" about the dispute.

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 65-66.

81. *Id.* Section 1692g of 15 U.S.C.A. describes requirements placed on debt collectors to validate debts. Among these requirements is the following provision:

> (b) Disputed debts
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> If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

15 U.S.C.A. § 1692g (West 1999).

82. *Brady*, 160 F.3d at 66.

83. *Id.*

84. 15 U.S.C.A. § 1692a.

85. *Brady*, 160 F.3d at 66 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed.1971)).

86. *Id.*

87. *Id.* at 66-67.

88. *Id.* at 67.

The court found that "[t]his 'knows or should know' standard requires no notification by the consumer, written or oral, and instead, depends solely on the debt collector's knowledge that a debt is disputed, regardless of how or when that knowledge is acquired. . . . Applying the meaning of "disputed debt" as used in [§] 1692g(b) to [§] 1692e(8) would thus render the provision's 'knows or should know' language impermissibly superfluous."[89]

This decision is important for legal assistance practitioners. Many soldiers do not come into legal assistance immediately after they receive notice of a collection action. Many try to work through it on their own by calling the collector. A decision to apply the thirty-day written notice requirement throughout the FDCPA would have seriously undermined the FDCPA protections for soldiers. With this decision, legal assistance attorneys can at least help to protect their client's credit rating while disputing a debt in collection. Violation of this section will also provide another tool for the attorney to use in negotiating a settlement of the matter for the soldier. Used in either manner, the decision by the First Circuit is a positive one for all consumers. Major Lescault.

Soldiers' and Sailors' Civil Relief Act (SSCRA) Note

Legal Assistance Attorney Asserts a SSCRA Stay and Is Found In Contempt of Court

Current Army legal assistance practice counsels against military legal assistance attorneys signing SSCRA[90] stay actions on behalf of soldiers.[91] Seasoned legal assistance attorneys base this advice on the rulings of several states that if a legal assistance attorney files a stay request with a court, he has made an appearance in the lawsuit.[92] Some courts may find an appearance even where the legal assistance attorney carefully explains that the request for a stay is not an appearance and that the soldier wishes to preserve all jurisdictional objections.[93] Only a few states take the opposite position and proclaim that an SSCRA stay request does not necessarily constitute an "appearance" in a lawsuit.[94] Failure to follow this advice can result in the client losing his right to reopen a default judgment under the SSCRA. When a court denies a soldier's SSCRA stay request made by a legal assistance attorney, he has "appeared" in the case, and the client may no longer reopen the default judgment.[95]

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89. *Id.*

90. 50 U.S.C.A. App. §§ 501-593 (West 1999).

91. *Id*. § 521. This section states:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

Id.

92. *See* Blankenship v. Blankenship, 82 So. 2d 335 (Ala. 1955); Skates v. Stockton. 683 P.2d 304, 306 (Ariz. Ct. App. 1984); Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750, 753-754 (Wis. Ct. App. 1989); Marriage of Thompson, 832 P.2d 349, 352-354 (Kan. Ct. App. 1992). *See also* Michael A. Kirtland, *Civilian Representation of the Military C*L*I*E*N*T*, 58 ALA. L. REV. 288, 289 (Sept. 1997); Legal Assistance Note, *Stays of Judicial Proceedings*, ARMY LAW., July 1995, at 68; Mary Kathleen Day, Comment, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L.J. 45, 55 (Fall 1991).

93. *Id. See* ROBERT CASAD, JURISDICTION IN CIVIL ACTIONS, Sect. 3.01(5)(a), pp. 3-46 to -47 (2d ed. 1991). "A motion for a continuance or for a stay or extension of time in which to plead usually will be a general appearance." *Id.*

94. *See* O'Neill v. O'Neill, 515 So. 2d 1208 (Miss. 1987); Kramer v. Kramer, 668 S.W.2d 457 (Tex. App. 1984); Marriage of Lopez, 173 Cal. Rptr. 718, 721 (Ca. App. 1981).

95. Major Garth K. Chandler, *The Impact of a Request for Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 MIL. L. REV. 169 (1983).

Recently, an Army legal assistance attorney received a scare when he ignored this advice on SSCRA stays. A soldier in Bosnia had a divorce hearing pending in Florida. The soldier's commander wrote a SSCRA stay request to the court. The Florida judge wrote the commander back, claiming only the soldier, as a party to the lawsuit, or a Florida-licensed attorney could assert the SSCRA stay.[96] The legal assistance attorney in Bosnia got on the LAAWS BBS[97] looking for a Florida-licensed judge advocate. A stateside judge advocate (Captain *X*), a Florida bar member, offered to write the SSCRA stay letter for the soldier. Captain *X*'s SSCRA stay letter to the Florida court expressly stated that he was not entering an appearance and referenced the SSCRA statute sections. He mentioned that he was a Florida bar member, and included his Florida bar number. The judge turned down the stay request, and set a hearing date for a case management conference, listing Captain *X* as the attorney of record for the soldier. The judge determined that the stay request was an appearance because: (1) it was signed by a Florida attorney, (2) to a Florida court, (3) on behalf of a Florida resident. The court notified Captain *X* by mail of the date of the case management hearing. Captain *X* attempted to phone the judge and the judge refused to speak to him, demanding that all contact with the court be in writing. Captain *X* wrote the court and opposing counsel stating he was not the soldier's attorney and did not represent him, except to request a stay under the SSCRA.

On the hearing date, the soldier appeared without Captain *X*. The judge ruled that opposing counsel could not discuss the case with the soldier without counsel of record, Captain *X*, being present. The judge found Captain *X* in contempt of court for not appearing at the designated divorce hearing, fined him $500, and ordered him to pay the other party's attorney fees. The judge also referred Captain *X* to the Florida State Bar Professional Responsibility Grievance Committee for breach of his duties to represent his client.

Captain *X* contacted the Office of the Judge Advocate General (OTJAG) Legal Assistance Policy Division through his technical chain of command. Captain *X* moved the court to withdraw from the case (the judge approved), but the judge refused to vacate the contempt finding. Captain *X* was successful in convincing the Florida Bar Professional Responsibility Discipline Board to dismiss the judge's professional responsibility complaint as unjustified. The OTJAG Litigation Division counsel found that Captain *X* was acting within the scope of his duties. They obtained U.S. Department of Justice counsel who represented Captain *X* and removed the contempt citation from Florida state jurisdiction to the federal district court. The federal judge dismissed the contempt action.

What are the teaching points from the unpleasant experiences of Captain *X*?

(1) Judge advocates should never sign a SSCRA stay letter to a court. You create more problems than you solve.[98] Alarms should have gone off when the Florida judge demanded that only the soldier or a Florida licensed attorney could assert the stay request. Such action allowed the court to obtain personal jurisdiction over the soldier. Your inadvertent appearance can be the reason your client may not reopen a default judgment where he has a meritorious defense.

(2) *Commanders may assert SSCRA stays on behalf of their soldiers.*

Generally, the courts give much more credence to the assertions of the soldier's commander, than those of a lawyer.[99] The Florida judge was clearly wrong to indicate to the solider that only a party to a lawsuit or a local attorney may assert a SSCRA stay. The SSCRA says that a lawsuit party or "some person on his behalf"[100] may assert the SSCRA stay request. It does not require that an attorney from the same state request the stay. Of course, judge advocates may assist a commander in drafting a stay request letter for one of his soldiers.[101] Such assistance

96. The judge's assertion was incorrect. Section 521 of 50 U.S.C.A. states in part, that a stay request may be presented by the plaintiff or defendant, "*or some person on his behalf* "(emphasis added). Neither the statute, its legislative history, or case law require that only an attorney may apply to a court for a stay for a military member. No case or statute requires that the attorney who applies for such a stay, on behalf of a military client, be a member of that state's bar. 50 U.S.C.A. § 521 (West 1999).

97. LAAWS BBS stands for the Legal Automation Army-Wide System Bulletin Board Service.

98. U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-7f (10 Sept. 1995) [hereinafter AR 27-3]. This regulation states in part:

> f. *Legal document filing* . . . (2) *Pro se Assistance*.
> (a) *Pro se* assistance is the help rendered to non-lawyer clients to enable those clients to file legal documents, papers, or pleadings in civil proceedings, such as small claims or uncontested divorces. Legal assistance may include preparing necessary documents and assisting with their submission to local courts. However, only a supervisor may authorize *pro se* assistance . . . .
>
> (b) Those providing legal assistance to clients on civil proceedings covered by the SSCRA are cautioned that a request for a stay of proceedings (or a letter) sent by a client or in the client's behalf may have the unintended effect of constituting consent to a court's jurisdiction.

99. *Id. See* Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (holding that where the commander of sailor requests a SSCRA stay, the court remands the case "in the interests of justice"); Lackey v. Lackey, 278 S.E.2d. 811 (Va. 1981) (holding that where a ship captain sent a sworn affidavit to the court indicating that a service member was unable to appear in court for several months until his ship returned to home port, the affidavit was not an appearance).

100. 50 U.S.C.A. App. § 521 (West 1999).

does not constitute "ghost writing" of *pro se* pleadings by military attorneys, which is prohibited by some state professional responsibility bodies.[102]

(3) Legal assistance attorneys may send a SSCRA stay request to opposing counsel. Legal counsel have an obligation to act with candor towards the tribunal in a lawsuit.[103] If you send an SSCRA stay request to an opposing counsel, he is obligated by his state attorney rules of professional responsibility to notify the court of the military status of the soldier party to the lawsuit.[104] Furthermore, opposing counsel must truthfully comply with the SSCRA affidavit requirement.[105] A SSCRA letter, written by a legal assistance attorney to opposing counsel is not an appearance before a court.[106] A soldier's SSCRA stay rights asserted in this manner preserves the soldier's right to assert jurisdictional defects and to assert his SSCRA right to reopen a default judgment if he has a meritorious defense.[107]

(4) If you are not sure about asserting a SSCRA stay, discuss your options with your technical chain of command. You can work your way out of difficult situations like that of Captain *X* if you discuss your plan with your chief of legal assistance, your deputy staff judge advocate, and your staff judge advocate.[108] You do not compromise client confidentiality by discussing how you wish to proceed on a case within legal assistance channels. If your office cannot resolve a problem, consider contacting the OTJAG Legal Assistance Policy Office staff. They have the advantage of hearing of similar legal assistance problems from all installations Army-wide and among the various services.

Lieutenant Colonel Conrad.

101. Kansas Attorney General Opinion Number 95-85, 1995 WL 813454 (August 15, 1995) (providing that attorneys acting under the authority of the Army legal assistance program may counsel and assist pro se military clients with the preparation of necessary documents to be filed in Kansas courts in specified civil proceedings without obtaining a Kansas law license). A sample legal assistance attorney letter for commanders to assert an SSCRA stay is at <http://www.jagcnet.army.mil>; Lotus Notes database, TJAGSA Publications, JA 260, Soldiers' and Sailors' Civil Relief Act (April 1998).

102. Electronic Message # 250173, LAAWS BBS, Chief, OTJAG Legal Assistance Policy Division, subject: Preparation of Pro Se Pleadings by Iowa Licensed Attorneys (5 Feb. 1997). Military legal assistance attorneys, licensed in Iowa, may not "ghost-write" pro se pleadings for military members, in courts in states where they are stationed, but not licensed, unless the state allows such a practice, the attorney reveals their participation to the court, and the attorney is authorized to practice in that jurisdiction, by that jurisdiction. *Id. See* Iowa Board of Professional Ethics and Conduct Opinions 94-35 (May 23, 1995) and 96-7 (Aug. 29, 1996). None of the above opinions or messages prohibit a military legal assistance attorney from assisting a commander in asserting a SSCRA stay request on behalf of one of their soldiers. A request for a SSCRA stay is not a "pleading," as contemplated by modern rules of civil procedure. Federal Rule of Civil Procedure 7(a), contemplates only a complaint, answer, and reply to a counter or cross claim as actual pleadings. A request for a temporary stay pursuant to the SSCRA is like a motion under Federal Rule of Civil Procedure 7(b). FED. R. CIV. P. 7(b). Military legal assistance attorney preparation of a SSCRA stay request is not addressed by the Iowa ethics opinions.

103. *See* Sacotte v. Ideal-Werk Krug, 359 N.W.2d 393 (Wis. 1984) (holding that a letter to opposing counsel does not confer personal jurisdiction over a defendant. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1983). This rule states: "In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse." *Id.*

104. *See supra* note 103.

105. 10 U.S.C.A. § 520(2) (West 1999).

106. Sacotte v. Ideal-Werk Krug, 359 N.W.2d 393 (Wis. 1984).

107. A model letter raising the SSCRA stay for opposing counsel is at <http://www.jagcnet.army.mil>; Lotus Notes Database, TJAGSA Publications, JA 260, Soldiers' and Sailors' Civil Relief Act (April 1998).

108. You must have the approval of your legal assistance supervising attorney before you provide assistance to a client by drafting legal documents, such as an SSCRA stay request. *See* AR 27-3, *supra* note 98, para. 3-7f (2)(a).